Neutral Citation Number: [2025] EWCA Civ 54

Case No: CA-2024-000306

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
BRIDGET LUCAS KC, TIM FRAZER & ROBERT HERGA
[2023] CAT 76

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2025

Before :

THE CHANCELLOR OF THE HIGH COURT
(Sir Julian Flaux)
LORD JUSTICE LEWISON
and
LORD JUSTICE GREEN

- -

Between :

Airwave Solutions Limited	**1st Appellant**
Motorola Solutions UK Limited	**2nd Appellant**
Motorola Solutions, Inc.	**3rd Appellant**
- and -	
Competition and Markets Authority	**1st Respondent**
Secretary of State for the Home Department	**2nd Respondent**

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Brian Kennelly KC & Paul Luckhurst (instructed by **Winston and Strawn London LLP; Slaughter and May**) for the **Appellants**
Josh Holmes KC, Naina Patel & Will Perry (instructed by **Competition and Markets Authority**) for the **1st Respondent**
Rhodri Thompson KC, Anneli Howard KC & Prof. Suzanne Rab (instructed by **TLT LLP**) for the **2nd Respondent**

Hearing date: Monday 11th November 2024

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Approved Judgment

This judgment was handed down remotely at 12 noon on Thursday 30th January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Green :

A. Introduction

1. There is before the Court an application for permission to appeal with the substantive appeal to follow immediately if permission to appeal is given.

2. The case concerns a judgment of the Competition Appeal Tribunal ("*the CAT*") dated 22nd December 2023 ([2023] CAT [76]) which, following a judicial review, upheld a decision of the CMA set out in a Final Report on "*Mobile radio network services*" dated 5th April 2023 ("*the Decision*"). This concerned the supply, under a long term Private Finance Initiative Framework Agreement ("*the PFI Agreement*"), of communications network services for emergency personnel by Airwave Solutions Limited ("*ASL*"), a subsidiary of Motorola Solutions, Inc., *via* what is commonly referred to as the "*Airwave Network*". The service was provided, in effect, to the Home Office on behalf of a range of public sector users.

3. The Decision concerns the pricing and profitability of the PFI Agreement during an extension period following expiry of the initial fixed term. It concluded that, during this period, there were features of the relevant market which caused an "*adverse effect on competition*" ("*AEC*") within the meaning of section 134 Enterprise Act 2002 ("*EA 2002*") which led to Motorola being able to earn profits which were "*supernormal*" by reference to what it could have earned in a hypothetical competitive market. In such a market the assets comprising the network would, in effect, have been fully written down upon expiry of the initial fixed term so that, going forward, they should be valued at zero. Certain provisions of the PFI Agreement are central to the analysis. In particular the agreement provided that upon termination the assets could be transferred to the user from the service provider at "*fair market value*".

4. On 31st July 2023, the CMA published a final order pursuant to section 161(1) EA 2002 ("*the charge control Order*") imposing a charge control limiting the revenue that could be earned for services during the extension period. The Order took effect on 1st August 2023 and served to reduce the price payable by the Government to below the contractually agreed price. The impact of the Decision upon Motorola was substantial. The Decision determined that unless altered, under the terms of the PFI Agreement, Motorola would charge over £1.2b to the Home Office in excess of that which would have been charged in the counterfactual of a "*well-functioning market*". The CMA remedied this by means of the charge control order. Motorola applied for judicial review under section 179(1) EA 2002. The application was refused by the CAT. The reasoning of the CAT in the Judgment endorses that of the CMA in the Decision. In a second Judgment ([2024] CAT [7]) the CAT refused permission to appeal.

5. Motorola applied to the Court of Appeal for permission to appeal. The nub of the application is that the CAT wrongly endorsed the reasons given by the CMA in the Decision. Because of this, argument before this Court focused more upon the reasons in the Decision than upon those in the Judgment. By Order of this Court dated 21st June 2024 the Court ordered that the application for permission to appeal be deferred to an oral hearing for full argument with the substantive appeal to follow immediately, if permission was given. The basis for this was that the application *"... concerns an issue of significant public importance, namely the application of regulatory and competition law principles to contracts entered into with governmental agencies made*

pursuant to otherwise lawful procurement processes." This Court heard full argument on 11th November 2024.

B. The statutory framework

6. Section 131 EA 2002 empowers the CMA to make a market investigation reference:

> "(1) … if the CMA has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom."

7. For these purposes:

> "(2) …any reference to a feature of a market in the United Kingdom for goods or services shall be construed as a reference to—
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> (a) the structure of the market concerned or any aspect of that structure;
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> (b) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
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> (c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.
>
> …
>
> (3) In subsection (2) 'conduct' includes any failure to act (whether or not intentional) and any other unintentional conduct."

8. Section 134(1) states:

> "(1) The CMA shall, on an ordinary reference, decide whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom. […]."

9. Section 134(2) provides that:

> "… there is an adverse effect on competition if any feature, or combination of features, of a relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom."

10. Section 134(4) provides that if the CMA decides that there is an adverse effect on competition, it must also decide whether, and if so, what action should be taken for the purpose of "*remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers.*"

11. Section 134(5) provides that:

> "(5) For the purposes of this Part, in relation to a market investigation reference, there is a detrimental effect on customers if there is a detrimental effect on customers or future customers in the form of—
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> (a) higher prices, lower quality or less choice of goods or services in any market in the United Kingdom (whether or not the market or markets to which the feature or features concerned relate); or
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> (b) less innovation in relation to such goods or services."

12. Section 136(2) provides for the preparation and publication of a reasoned report relating to the market investigation. Where a report has been prepared and published and contains the decision that there is an AEC, section 138 provides:

> "(2) The CMA shall, within the period permitted by section 138A, in relation to each adverse effect on competition, take such action under section 159 or 161 as it considers to be reasonable and practicable—
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> (a) to remedy, mitigate or prevent the adverse effect on competition concerned; and
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> (b) to remedy, mitigate or prevent any detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effect on competition.
>
> (3) The decisions of the CMA under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 134(4) unless there has been a material change of circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently."

13. Sections 159 and 161 provide the CMA with the powers, respectively, to accept final undertakings and to make final orders for the purpose of remedying an AEC. A final order under section 161 may contain anything permitted in Schedule 8. This covers a range of actions including regulating the prices to be charged for any goods or services (paragraph 8) or requiring a person to do anything which the CMA considers appropriate to facilitate the provision of goods or services (paragraph 10).

14. Section 179 provides that any person "*aggrieved*" by a decision of the CMA may apply to the CAT for a judicial review of that decision. In determining such an application, the CAT applies the same principles as would be applied by a court on an

application for judicial review. Under subsection (5), in relation to outcome, the CAT "*may*":

> "(a) dismiss the application or quash the whole or part of the decision to which it relates; and
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> (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make anew decision in accordance with the ruling of the Competition Appeal Tribunal."

C. How the issue came about: The pricing and profitability of Motorola under the agreement for the extension of the Airwave Network

The Airwave Network

15. The Airwave Network is a national service. It is used by all police, fire and rescue, and ambulance services in Great Britain as well as by a number of central Government Departments, including the Home Office, Department of Health, Department of Transport, Department for Environment, Food and Rural Affairs, Department of Work and Pensions, and Ministry of Defence. It is also used by other "*sharer organisations*" such as local councils, coastguard, mountain rescue and certain charitable organisations. Under the system more than 300,000 emergency personnel can communicate securely. It is considered to be important for national security. Paragraph [6.64] of the Decision gives a flavour of its nature, size and scale:

> "The provision of Airwave Network Services relies on a dedicated infrastructure comprising the transmission network, regional switching centres, 3,800 radio transmitters (also known as base stations) providing the TETRA radio voice and data coverage, as well as various network management centres, control systems and specialist technologies…"

Further detail is set out in Section 2 of the Decision.

The commissioning of the network under a Finance Initiative framework arrangement

16. The Airwave Network was commissioned by the Home Office under a Private Finance Initiative framework arrangement in 2000 pursuant to a procurement process won by British Telecommunications plc ("*BT*"). The OJEC entry made clear that the term of the agreement was fixed with no expectation of an extension. Paragraph [2.51] of the Decision stated:

> "2.51 The PFI Agreement was initially envisaged as an overall framework contract for an estimated period of up to 19 years. That period was determined by: (i) the 15-year service contracts under which services would be provided to individual police forces (see below), which had different commencement dates and at the end of the last of which the PFI Agreement would itself end; (ii) the time needed to build the network and then to decommission it at the end of the service contracts; and

> (iii) the network having become fully operational from 2003. The applicable procurement regulations had the effect of setting an expectation, by the OJEC notice, that the contract would not be extended. Unlike the current procurement regulations, the applicable procurement regulations did not specify whether it was necessary for any possibility of an extension to be included in the OJEC notice. However, the OJEC notice specifically provided that the service would be completed after the 15-year period after 2003 (and what emerged from the procurement process was the PFI Agreement which provided for a fixed-term arrangement that would end at a point to be determined in 2019 or 2020 without terms relating to, or contemplating, its extension."

17. Three consortia formed to bid for the agreement but only one bid was ultimately received, that from BT. The CAT pointed out (paragraph [72(2)]) that the National Audit Office ("*NAO*") had commented that the procurement process had been subject to limited competition. Under the PFI Agreement BT set up ASL to design, build, finance, own and operate the network.

The key terms of the PFI Agreement on asset transfer upon termination

18. Details of the PFI Agreement are set out in paragraphs [4.58ff] and in Appendix C to the Decision. The agreement included a mechanism for service transfer, the aim of which (paragraph [4.61]) was to facilitate an effective handover of the responsibility for the provision of the network services to the Home Office upon the termination of the PFI Agreement. The Home Office has the right to terminate the PFI Agreement at any time in certain defined circumstances. Examples include: the giving of 12 months notice, change of control, insolvency, material default, etc. Because the term was fixed, the transfer provisions also applied upon termination of the agreement due to expiry of its full term. The provisions for valuing assets to be transferred upon termination are complex. It suffices for present purposes to record that assets were to be transferred at "*fair market value*".

The procurement process for a replacement Emergency Services Network

19. Between April 2014 and September 2015, the Home Office ran a procurement process for the establishment of an Emergency Services Network ("*ESN*") intended to replace the Airwave Network. ESN had advantages in that it would facilitate greater data transfer and use a commercial mobile network for most communications as opposed to the Airwave Network which used a dedicated network. On 8th December 2015, the mobile network operator EE was awarded the main contract to establish the network infrastructure. Motorola was awarded a contract for the provision of "*User Services*" (although the contract for this was terminated in 2022). The Home Office intended that ESN would replace the Airwave Network by 2020 which was when the PFI Agreement was due to expire.

The approval by the CMA of the acquisition of ASL by Motorola

20. In 2007, ASL was acquired by Macquarie Communications Infrastructure Group ("*Macquarie*"). During 2015, Motorola negotiated with Macquarie to acquire ASL

and a sale and purchase agreement was concluded on 3rd December 2015. The Home Office had a right of termination in respect of the transaction on grounds of change of control. The proposed transaction was reviewed and cleared by the CMA under the EA 2002, having taken into account the views of the Home Office. As part of the acquisition, Motorola and the Home Office entered into a number of agreements executed on 17th February 2016, which included an agreement that the Airwave Network would continue to be provided at a fixed price under the PFI Agreement until such time as the Home Office served notice to terminate.

Negotiations for the extension of the Airwave Network post expiry of the term

21. Many aspects of the development of ESN have fallen behind the Home Office's desired timetable. It became increasingly clear that it would not be ready by 2020, when the PFI Agreement was due to expire. Between 2016 and 2021, Motorola and the Home Office negotiated over the terms of the Airwave Network service and its possible extension pending the coming into operation of ESN. It is unnecessary to go into detail. Negotiations in 2016 and 2017 led to the agreement of certain discounts. In 2018, the Home Office agreed to an amendment guaranteeing that the Airwave Network would run until at least 31st December 2022 and in return Motorola agreed a further discount. Negotiations in 2021 did not provide for provision of the service beyond 31st December 2022 even though at that point ESN was not anticipated to be available to users before the end of 2026. On 20th December 2021, the Home Office exercised its power under the PFI Agreement to specify the "*National Shut Down Target Date*" of the Airwave Network as 31st December 2026. The effect was that the service would be provided until that date at the prevailing contractually agreed prices, this being the prices agreed in 2016.

22. The Home Office however was not satisfied with the discounts it had been offered (and agreed to). It considered that the assets comprising the Airwave Network had been effectively paid for over the duration of the initial term of the PFI Agreement and they should not form part of the pricing for continuation of the system. For its part Motorola sought to rely upon the contractually agreed prices, though was prepared to agree some level of discount. It sought certainty as to the duration of the contract given that the Home Office was entitled to terminate for any reason on 12 months' notice. It needed security to justify the investments required to maintain the service.

D. The Decision

The Home Office complaint to the CMA

23. On 14th April 2021, the Home Office, at the request of the Cabinet Office, complained to the CMA about the level of profitability earned by Motorola from the Airwave Network during the extension period.

Motorola's submissions

24. The Decision (paragraph [4.18(a)-(m)]) summarises the arguments of Motorola in response. Broadly, Motorola argued that: (i) the CMA should adhere to its prior analysis of the Airwave Network and ESN undertaken in 2016 when it assessed Motorola's merger with Airwave Solutions and cleared the acquisition as having no

material adverse effects upon competition; (ii) competition in relation to the relevant network services took place "*for the market*" and there was competition "*for*" the market in 2000 (resulting in the PFI Agreement) and in 2015 (the procurement of ESN) and nothing had changed since then; (iii) nothing else of a material nature had occurred following expiry of the initial term since all that happened was an amendment to the existing PFI Agreement so that Airwave continued as a back-up (if necessary) after 2019 until ESN was ready and the terms of this continuation had been freely agreed at a point in time when the Home Office knew that ESN was not ready – those terms should be respected; (iv) any resulting imbalance was the result of a free and fair negotiation and should not be criticised after the event by reference to the artificial hypothesis of the well-functioning market; (v) the splitting of the PFI Agreement into 2000 to 2019, and, 2020 to 2026 was accordingly irrational and created an artificial[1] optic through which to measure the pricing for the extension of the PFI Agreement; (vi) according to data the CMA did not challenge, the Home Office received a substantially better bargain than the one agreed to in 2000 when assessed over the entire period from 2000 to 2026 and the actual project IRR over that period fell below the anticipated level which the Home Office agreed in 2000; and (vii), insofar as there was a failure it lay at the door of the Home Office procurement process for ESN, this being the most recent "*instance of competition for the market*", the failure to deliver, timeously, a working solution should be at the heart of the CMA's investigation, not Motorola's prices and profitability.

25. The CMA also summarised the arguments of Motorola concerning the asset transfer provisions of the PFI Agreement. These are set out in sub-paragraphs (h) – (k) of paragraph [4.18]. They concerned: (i) the relevance of the asset transfer provisions; (ii) the incentive for the Home Office to acquire the assets; and (iii), the workability of the provisions. Given their significance to arguments before this Court I set out in full the CMA Summary of those arguments:

> "(h) The asset transfer provisions in the PFI Agreement are an irrelevant consideration. Motorola said that the CMA asserts that, had those provisions been drafted differently or were more effective, the Home Office could have acquired the Airwave Network and ESN would never have been procured. However, the Home Office had no interest in acquiring the network in 2016 and was completely focused on ESN, which it pursued for reasons including the desire to replace the Airwave Network with a new network offering enhanced functions.
>
> (i) There is, nonetheless, no uncertainty today that would prevent the Home Office from exercising its option to acquire the transferable Airwave Network assets (for example, on expiry of the PFI Agreement in December 2026). Motorola also said that the asset transfer provisions '… were simple, were effective and could have been applied … at any time by the Home Office…..,' and that the Home Office had the option to acquire the Airwave Network assets, and could have done so, in 2019 and still can.

[1] Motorola argued in submissions that it was "*obviously untenable*", "*pure fantasy*" and "*…does not satisfy the obvious requirement that the counter-factual should be a realistic one*".

> (j) Motorola also said in connection with the possible transfer of the Airwave Network assets after 2019 that: '… the Home Office evidence … makes clear however, the Home Office was not seeking a long-term solution after 2019 which might involve competition for the market or the use of the asset transfer provisions to bring Airwave into the Home Office. Instead, the Home Office was seeking only short extensions and against this commercial objective the subject of asset transfer was irrelevant to the Home Office since it would make no sense to take over the assets for such a short period. Had the Home Office made (or would now make) a different contractual choice, the asset transfer provisions were (and are) available and effective. The CMA is not entitled to deduce from the Home Office preference not to organise a competitive tender that a competition problem exists. Any problem of an absence of competition is caused solely by the Home Office refusal to invite bids.'
>
> (k) Additionally on the same issue Motorola noted that ownership of the Airwave Network assets has transferred three times with no impact on the operation of the network. The most recent transfer was in 2016, when Motorola acquired Airwave Solutions. At that time, the contract to provide the network services only had a minimum period of four years to run. Any notion that future dependency on Motorola precludes an asset transfer was, it said, 'without foundation,' and there are no technical or operational reasons that present obstacles to such a transfer."

The CMA investigation and the Decision

26. On 25th October 2021, the CMA initiated a market investigation reference ("*MIR*") under section 131 EA 2002. The Decision was adopted in April 2023 and exceeds 600 pages in length. It contains a helpful Summary ("*the Summary*") at the outset which has been relied upon by all parties as fairly reflecting the substance of the remainder of the Decision albeit, of course, that it does not purport to be exhaustive. I refer below to both the Summary and other parts of the reasoning in the Decision.

The description of the PFI Agreement

27. The PFI Agreement is described in paragraphs [2.50] – [2.53]. The agreement sets out the agreed rights and obligations of the parties. The schedules address matters such as the services contracted for, the charging structure for those services, benchmarking and termination. The agreement was initially envisaged as a framework contract for a period of up to 19 years determined by: (i) the 15-year service contracts under which services would be provided to individual police forces which had different commencement dates and at the end of the last of which the PFI Agreement would itself end; (ii) the time needed to build the network and then to decommission it at the end of the service contracts; and (iii), the network having become fully operational from 2003.

28. The Decision explained that under the procurement process the term of the PFI Agreement was fixed with no expectation of an extension (see paragraph [16] above). The agreement set out the structure of charges comprising a core service charge payable for access to the Airwave Network, and menu service charges which users could elect to purchase from Airwave Solutions. The contract specifies the initial level of core service and relevant service charges and contains provisions for these to be adjusted annually in line with inflation according to a set formula which includes benchmarking.

The bespoke nature of the Airwave Network

29. The importance to the emergency services of the Airwave System, and its bespoke nature which meant that it could only be provided by a single supplier, was described in paragraphs [1] – [7] of the Summary:

> "1. It is critical that emergency services staff are able to communicate effectively with each other, with staff at base and with other organisations involved in tackling an emergency. That is essential for them to do their job and to protect their safety and that of the general public.
>
> 2. The emergency services require communication network services that are reliable 24 hours a day, 365 days a year; that enable them to communicate across regional boundaries and organisations; that provide coverage even in remote and hard to reach locations; and that include specialist features such as high speed call set up, emergency buttons, encryption, group calls and ambient listening.
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> 3. In Great Britain, those communication services are provided through a bespoke integrated network called the Airwave Network. It uses Land Mobile Radio (LMR) technology developed specifically for public safety and is fully dedicated to serving the emergency services and organisations which need to communicate with them.
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> 4. The Airwave Network's users belong to one of five customer groups, each with its own specific set of requirements. They are: 44 police forces; 50 fire and rescue services; 14 ambulance trusts; the National Police Air Services; and 165 other organisations (described as 'Sharer' organisations), such as the Maritime and Coastguard Agency, who need to communicate with the emergency services.
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> 5. The Airwave Network was set up under a Public Finance Initiative (PFI) Agreement made with the Police Information Technology Organisation (subsequently replaced by the Home Office) in 2000 following a public procurement exercise. That agreement was originally set to end after 19 years, around 2019. Services are provided under the terms of separate agreements that were entered into with individual emergency

> services user groups in subsequent years. The network is owned and operated by Airwave Solutions (which was acquired by Motorola in 2016).
>
> 6. As a bespoke integrated network fully dedicated to emergency services communications covering the whole of Great Britain, the Airwave Network is operated by a single supplier. No alternative network providing similar services exists.
>
> 7. In 2014/15, the Home Office conducted a further procurement exercise for the provision of a new upgraded network, with enhanced functionality, to replace the Airwave Network, called the Emergency Services Network (ESN). That replacement was originally intended to happen in or around 2020, but it has not yet taken place."

The relevant market/competition "for" the market

30. The CMA identified the relevant market for its investigation as: "*The supply of communications network services for public safety and ancillary services in Great Britain.*" (paragraph [9]). Because the system was bespoke and there would necessarily be a single supplier to the market, and because the successful supplier would be secured *via* a tendering process, the procurement exercise would be "*for the market*":

> "10. We have considered how competition can occur in that market. Building a bespoke integrated network of the kind required meant that a single supplier would be best placed to meet the emergency services' needs under long-term contracts. Under such contracts, the supplier could recoup the large upfront investment required to build the network, and have the chance to earn an estimated rate of return, over the life of the contracts.
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> 11. Competitive constraints on suppliers in this market, therefore, typically arise through 'competition for the market'. It can occur when long-term contracts are first tendered and when they expire (or, more specifically, in anticipation of their expiry when a replacement network or a retendering of the existing network is competed for)."

The counterfactual – "the well-functioning market"

31. Given that the case concerned the extension of the service beyond the initially agreed term, the CMA considered what terms and conditions might have arisen for the extension had they been generated in a hypothetical "*well-functioning market*":

> "12. In a well-functioning market, we would expect one set of competitive arrangements to be replaced by another when such

> long-term contracts come to an end. That could, for example, be the replacement of the existing arrangements by:
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> (a) a competitively priced continuation of the operation of the existing network infrastructure (secured, for example, under a retendering process facilitated by the transfer of the assets to the Home Office, or by the threat of such a process); or
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> (b) a competitively priced new network (for example, one tendered under a new process), that could use new technology and offer enhanced functionality."

In paragraph [13], in relation to what would occur in this paradigm market, the CMA posed what it considered to be the critical question: "*We have therefore assessed whether this has occurred and, if not, why not.*"

Temporal considerations – the period following expiry of the initial term of the PFI Agreement

32. In paragraphs [14] – [16] of the Summary, the CMA explained that its analysis was temporal. It accepted that the PFI Agreement was brought about by virtue of an open tendering competition "*for the market*". It accepted that any number of bidders could (in theory) have come forward who would set their bids at levels which covered costs and generated a proper return on investment over the course of the contractual term but who would have been constrained by the fact that they had to bid at a competitive level in order to secure the contract. However, the CMA concluded that now the initial period had run its course the situation was "*materially different*", and Motorola was in "*... a virtually unconstrained monopoly position*":

> "14. In our assessment, the terms of the PFI Agreement under which the Airwave Network operates resulted from the type of process – tendering – that we might expect to provide competition for the market. In relation to the original period of the PFI Agreement, the Home Office had the opportunity to run an open competition for a supplier and, as a result, to agree terms that constrained the price of the provision of the network. In such a competition, the winning supplier would reasonably have been expected to set the price at a level that would enable it to cover its expected costs and give it the chance to earn a reasonable return for the period of the contract.
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> 15. The PFI Agreement that resulted from the original procurement exercise was for a fixed term ending in 2019. It provided for a contract price designed to recoup the supplier's upfront investment in building the network and offer it the possibility of earning an estimated rate of return over that period, but not beyond. It contained provisions which sought to deal with the end of the contract and the transfer of assets to the Home Office (or a third party). It did not contain terms relating to or contemplating its extension. The relevant provisions were

> therefore generally the type of terms we might expect to find in a well-functioning market up to 2019 (albeit that they were not all necessarily fully effective in achieving their objectives).
>
> 16. The position now that the original period of the PFI Agreement has ended, however, is materially different. Our assessment is that the terms on which the Airwave Network is provided after 2019 are better characterised as reflecting a virtually unconstrained monopoly position on the supplier's part rather than the result of a competitive process."

33. The period post-expiry of the initial term was "*materially different*" because prices relating to the extension of the agreement were now fixed in bilateral negotiation between Motorola, as a monopoly supplier and owner of the system, and the Home Office acting for all users. As a result, Motorola had superior bargaining power:

> "17. Instead of being set through a competitive process, prices are established (or maintained without significant variation from previous levels) in bilateral negotiations between Airwave Solutions (the monopoly supplier) and its owner, Motorola, and the Home Office relating to the extension of the PFI Agreement. In those negotiations the Home Office has no credible alternative option in terms of its choice of supply or supplier."

In footnote [9] the CMA explained what was meant by "*credible*":

> "We use the term credible' to describe options which the Home Office would be in a position in practice to pursue or threaten to pursue, and / or which Motorola would regard as a threat to its ability to set prices, such that the price is likely to be constrained to the competitive level."

34. In paragraphs [18] – [26] the CMA compared the terms that Motorola had agreed with the Home Office for the new, extended, periods against those that they would have expected in the counterfactual, competitive, market where at the end of the initial term of the contract the supplier's costs would have substantially changed (downwards) and the risks (in terms of revenue stream) would be much lower. The differential was attributable to the inequality of bargaining power that characterised the relationship post-expiry of the term of the PFI Agreement:

> "18. The terms on which the network is supplied, particularly the price, have not materially changed as we would expect in a competitive market to reflect that, now the original period of the PFI Agreement has ended:
>
> (a) The costs of providing the Airwave Network will have fallen significantly compared with the previous period where the supplier had to incur the substantial set-up costs of building the network; and

(b) the risk borne by the supplier is much reduced after 2019 because the network is built and is operating as a reliable income stream.

19. In other words, after 2019 the terms of the (extended) PFI Agreement do not result in a price or a level of profitability that would be expected in a well-functioning market. This is reflected in the generation of supernormal profits after the original period of the contract.

20. Key reasons for the present position, in our assessment, are that:

(a) The network for emergency services communications is critical national infrastructure providing services on which lives ultimately depend, so the Home Office and the emergency services users must have continuous and reliable access to a high-quality integrated network that meets their operational needs, without disruption or degradation;

(b) the asset transfer provisions in the PFI Agreement have not resulted in the transfer of network assets to the Home Office, Airwave Solutions continues to own them and acquiring them is not an option the Home Office could credibly pursue or threaten; and

(c) the government's chosen replacement for the Airwave Network, ESN, is taking considerably longer to implement than was contemplated: (i) when it was procured; and (ii) in 2016 when the parties first negotiated terms that relate to the provision of the Airwave Network after 2019.

21. As a result, the Home Office and the emergency services in Great Britain are 'locked in' to a monopoly provider, Airwave Solutions, and will be in that position until at least 2026, likely until 2029 and possibly longer.

22. Our judgement is that Airwave Solutions and its owner, Motorola, now have considerable market power. In the negotiations between Airwave Solutions and the Home Office relating to the continued provision of the Airwave Network beyond 2019, there is a lack of constraint or pressure on the price that would result in it being set at the competitive level. The Home Office is in a particularly weak bargaining position. Airwave Solutions / Motorola can set and maintain a price substantially above the level we would expect in a well-functioning market.

23. Other factors reinforce Airwave Solutions' and Motorola's market power and the weakness of the Home Office's bargaining position:

> (a) The fact that, in any negotiations, they are negotiating against the default option of the price agreed in 2016, which is very advantageous to Airwave Solutions and Motorola and correspondingly disadvantageous to the Home Office;
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> (b) the Airwave Network's dependence on Motorola for equipment and upgrades for its ongoing operation;
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> (c) the asymmetry of information between the parties; and
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> (d) the likely ineffectiveness of the original contractual provisions relating to price benchmarking (and the lack of reliable comparators that make any benchmarking exercise practically very difficult (if possible at all)).
>
> 24. As well as being dependent on the continued provision of the network by Airwave Solutions / Motorola, without disruption or degradation, the Home Office's ability to challenge the terms they propose or maintain is very substantially limited. The Home Office is not in a position to assess the profitability of any price and effectively to challenge its reasonableness. Not only does the Home Office lack bargaining power in the negotiations, but it is not in a position reliably to determine whether, or the extent to which, Airwave Solutions is charging or maintaining (or seeking to charge or maintain) prices that result in supernormal returns.
>
> 25. A further issue adds to the competitive distortions in the market. During the period (estimated to be at least 27 months) in which the transition between them will gradually take place, the Airwave Network and ESN will need to be linked.
>
> 26. The development of an interworking solution relies on Airwave Solutions' and Motorola's active cooperation. As a result, they have the ability to delay, hamper and/or make more costly the development of any such solution and the transition process. The competition issues described in paragraphs 12 to 24 above in particular, and the high profits they can make if the transition from the Airwave Network is delayed, meanwhile, dull their incentives effectively and efficiently to help to deliver such a solution."

Findings on "features" giving rise to an Adverse Effect upon Competition ("AEC"): The earning of "supernormal profits"

35. In paragraph [27] the CMA concluded that there were "*features*" of the market that prevented, restricted or distorted competition and led to an AEC:

> "Taking all of the above points into account, we find that features of the market for the supply of communications network services for public safety, individually or in

> combination, prevent, restrict or distort competition in connection with the supply of LMR network services for public safety in Great Britain. There is, in our view, an AEC in that market."

Because of these "*features*" Motorola had "*unilateral market power*" and was able to charge prices significantly above the level expected in a competitive market and make "*supernormal*" profits.

36. In paragraph [28(a)-(h)] the CMA identified these "*features*". I summarise below the features identified by the CMA which do not flow directly from the terms of the PFI Agreement. Because the PFI Agreement was the subject of argument before the Court, I set out verbatim the CMA analysis of those "*features*" which do arise directly from the PFI Agreement.

37. The first feature unrelated to the terms of the PFI Agreement was that the Airwave Network was "*critical*" infrastructure on which the emergency services depended. The second was that the service had to be provided by a monopolist pursuant to a long-term contract and that no other replacement network existed nor was likely to be constructed and ready for use before ESN. Thirdly, ESN was "*taking much longer than anticipated to deliver*" and would not be ready "*until at least 2026, likely 2029 and possibly later.*" Fourthly, the Home Office was "*locked-in*" to Motorola "*beyond the period over which prices were, or should have been, constrained by the terms of the PFI Agreement (and Airwave Solutions should have recouped its investment and had a chance to earn a reasonable return).*" This meant that the Home Office had "*very weak bargaining power*". Fifthly, there was *"... asymmetry of information between the parties*" with the Home Office at the disadvantage.

38. The two "*features*" related to the PFI Agreement were in subparagraphs (c) and (h). These concerned: (i) the credibility of the transfer of assets upon expiration of the term of the agreement; and (ii), the absence of any provisions in the agreement effectively constraining prices after the initial term, during any extension:

> "(c) The Airwave Network assets have not transferred to the Home Office under the terms of the PFI Agreement, Airwave Solutions still owns them (and the related business) and the transfer of those assets is not a credible option that the Home Office could either pursue or threaten to pursue."

And,

> "(h) There is a lack of effective constraints provided by the terms of the PFI Agreement on the price of the provision of the network after 2019, including the benchmarking provisions which are likely to be ineffective."

39. In paragraph [29] the CMA identified an additional feature which strengthened and prolonged the AEC features summarised in paragraph [28]. This was *"... the role of interworking in the transition between the Airwave Network and ESN, which Airwave Solutions and Motorola are able and incentivised to delay, hamper and/or make more costly.*"

Customer detriment – the scale of supernormal profits

40. The CMA concluded that Motorola would, over the extension period, earn "*superprofits*" i.e. profits over and above that which would be expected in a competitive market, in a sum of c.£1.27 billion. This reflected customer detriment:

> "Customer detriment
>
> 30. Our estimate is that the AEC we find means that Airwave Solutions, and Motorola, can be expected to make total supernormal profits from the operation of the Airwave Network of around £1.27 billion between 1 January 2020 and 31 December 2029. This is equivalent to charging almost £200 million per year more than we would expect to see in a well-functioning market.
>
> 31. These supernormal profits are a reflection of Airwave Solutions' and Motorola's ability to set and maintain prices very substantially above the competitive level. The Home Office and the emergency services in Great Britain are paying a much higher price than we would expect were the market competitive. That enables Airwave Solutions to contribute around 21% of Motorola's global pre-tax profits while accounting for only around 7% of its global revenues.
>
> 32. The supernormal profits are, in our view, a reasonable measure of the transfer of welfare from the emergency services, and the taxpayers who fund them, to Motorola shareholders that results from the AEC we have identified. They indicate that a significant detrimental effect on customers results from that AEC."

Valuation of assets during the extension period

41. In determining the scale of excess profits, the CMA sought to value the assets going forward. The Decision identified the relevant time period for the valuation of the assets employed. The Decision (paragraph [6.16]) explained:

> "… an economically meaningful assessment of the profitability of the Airwave Network should:
>
> (a) be split around 2020, with a separate assessment of profitability for the period from 2001 to 2019 (PFI period), and for the period from 2020 onwards (post-PFI period). In our view, the PFI Agreement represented an economic 'bargain' between the Home Office and Airwave Solutions, wherein the latter was provided with significant, long-term certainty over revenues and downside protections in return for it assuming the costs (both capital and operating) and risks associated with building and operating the network for the period covered by the PFI Agreement; and

> (b) reflect the balance of risks and rewards in each period. In this case, we consider that the economic logic of the PFI Agreement was that in the PFI period Airwave Solutions was provided with a reasonable opportunity to recoup the initial investments in the Airwave Network, with the various protections provided to Airwave Solutions as set out above. Therefore, in any extension to that initial fixed-term period, it follows that those investments should not be remunerated again since such an outcome would result in customers paying twice for the same assets. In our view, that would not represent a reasonable benchmark for a well-functioning market. …"

42. In paragraph [6.17(a)] the CMA observed: "*... given the large up-front capital costs associated with the network and the relatively lower on-going maintenance capital costs, we note competition for the market can only be expected to produce a competitive price over a timeframe that is clear and agreed ex ante. It cannot be expected to produce a competitive price over an indefinite period.*". To value the assets as of 2020 in order to calculate Motorola's IRR for the period from 2020 – 2029, the CMA took a "*value-to-the-business*" approach ("*VTB*"). The CMA rejected the argument of Motorola that VTB should be calculated using the assets' replacement value, on a "*Modern Equivalent Asset*" ("*MEA*") basis. Instead, a framework for analysis was adopted whereby VTB was set as equal to the lower of the replacement cost and the recoverable amount for the assets, where the recoverable amount was the higher of (a) the value in use, and (b) the net realisable value. The Tribunal endorsed the analysis of the CMA in paragraph [6.66] of the Decision which provided:

> "6.66 Our approach was based on our assessment that the sunk costs of the network, which had already been paid for by customers, should not influence pricing during an extension period that was not planned for. Put another way, we were not minded to consider that in a well-functioning market customers would, in effect, pay twice for the same assets if the life of the network were extended beyond the term originally envisaged when the LMR network was commissioned. We noted that the (new) replacement cost approach, which Motorola put forward as the appropriate benchmark, would result in such an outcome."

43. In paragraph [6.91] the CMA described how, in its view, a well-functioning market could be expected to operate after 2019:

> "… we would expect pricing during such an extension period to be constrained at a level at which the supplier was, broadly, only able to recover the incremental investment in the network required to extend its life, its (efficient) operating expenses, and a reasonable return on its capital, taking into account the (much reduced) risks assumed by the supplier over the extension period. This result could be achieved via different mechanisms, including, for example the contract providing effectively for the transfer of the network assets at the end of the contract period.

> This would allow for the re-tendering of the provision of services using that already built-and-paid-for network."

In footnote [572] the CMA added that: "*A different alternative could be for the contract to require that the original supplier reduce prices during any extension period to reflect the fact that the network assets had already been 'paid' for over the original contract term.*"

44. With these considerations in mind, the CMA found that (a) the value-in use of the assets would be zero during the period from 2020; but (b) an allowance of £80m should be made for investments made specifically to operate the network beyond the end of 2019 and the residual alternative use value of ASL's assets.

Remedy – "Charge Control"

45. In paragraphs [33] – [41] of the Summary, the CMA explained its conclusion that the most effective and proportionate remedy was one of price control. No part of the remedy is subject to a challenge by Motorola. I can summarise the principal measures briefly. The detail is set out in the Decision at Section 8. The Charge Control was cost orientated and designed to allow full recovery of the costs associated with the provision of the Airwave Network. It also provided for Motorola to earn a reasonable rate of return, including in respect of additional investments. The Home Office in its written submissions said that the CMA modelled the charge control on a conservative basis, having taken account of Motorola submissions which led it to increase provision for opex, indexation, additional capex, and an increased provision for capex risk budget and higher return on capital. There is a review in 2026 and the remedy runs until 31st December 2029.

E. Grounds of appeal/The scope of judicial review

46. Motorola advances two proposed grounds of appeal:

Ground I:

> "The Tribunal erred in law because it should have found that the failure by the CMA to take any account of dynamic, long-term competition between the Airwave Network and the Emergency Services Network in the competitive assessment in section 4 of the Decision constituted a failure to take account of a material consideration."

Ground II:

> "The Tribunal erred in law because it failed to find that the CMA's profitability analysis in section 6 of the Decision was irrational, and/or failed to take account of a material consideration, and/or was internally inconsistent with other fundamental reasoning in the Decision."

47. There was no material dispute between the parties as to the principles to be applied both in relation to the law governing permission to appeal and as to the principles of

judicial review applied by the CAT. As context, I set out some observations as to the approach to be taken.

48. This Court has had cause to emphasise that the role of the CAT in a judicial review can involve a close scrutiny of the facts, an exercise which is not incompatible with the CAT also according to the decision maker an appropriate margin of appreciation: See *Office of Fair Trading and others v IBA Healthcare Limited* [2004] EWCA 142 ("*IBA*") as analysed and applied in *Cerelia Group Holding SAS and others v CMA* [2024] EWCA Civ 352 at paragraphs [28]-[41]. This is consistent with the Supreme Court in *Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority & Anor* [2015] UKSC 75 at paragraph [44] where the Court observed that in relation to matters involving economic analysis (in particular in merger cases) caution was required before an appellate court was justified in overturning the economic judgments of an expert tribunal such as the Authority and the CAT.

49. The extent to which deference is due will depend upon the nature of the challenge. Where it is argued that the decision maker erred in, for example, the interpretation of a contract or other instrument, very little, if any, deference will be accorded. However, where the decision maker has balanced and reconciled complex evidence then appropriate deference will be accorded. In the present case some of the arguments challenge the intrinsic logic and consistency of the reasoning in the Decision. To this extent the answers to the arguments arising can be determined simply by close analysis of the Decision as a whole in order to see whether, as is alleged, the CMA failed to address a relevant consideration or was internally inconsistent in its logic and reasoning. Insofar however as there are arguments which attack the rationality of the CMA's economic evaluation, then the CAT will accord it a margin of appreciation and on an appeal this Court is considering whether the CAT's Judgment properly concluded that the CMA's evaluation was within the bounds of its discretion.

F. Ground I: The failure to take account of dynamic long term competition

Motorola's submission

50. The submission of Motorola can be boiled down to the following. In section 3 of the Decision, the CMA found that there was sufficient competition between the Airwave Network and ESN for them both to be classified as being in the same "*market*". This was long term, dynamic, competition which arose from the competitive threat posed to Motorola by the fact that ESN was due to enter the market and, in effect, take away Motorola's market share. However, when considering the competitive interaction between the Airwave Network and ESN in section 4 of the Decision, the CMA found that the Airwave Network enjoyed a "*virtually unconstrained monopoly position*". This presupposes *insufficient* competition as between the Airwave Network and ESN. The CMA's analysis was thus inconsistent and the Decision, which is based upon Motorola having more or less unconstrained market power, reflected a failure to take account of a material consideration, viz., the finding that there was dynamic longer-term competition sufficient to frame the relevant market. Since there was a competitive relationship between the Airwave Network and ESN that, necessarily, was relevant to the analysis of AEC in section 4.

51. Motorola draws attention to various paragraphs in the Decision which it argued reflects acknowledgment on the part of the CMA of the interconnectedness of the concepts of market definition, and, impact upon competition: (i) in paragraph [3.64] market definition is described as the process to identify the boundaries within which competition occurs for particular goods and services, such as which firms compete for which customers' business; (ii) in paragraph [3.66] market definition and the assessment of competition are recognised as not being distinct chronological stages of an investigation but rather as overlapping and continuous pieces of work, which often feed into each other; (iii) in paragraph [3.75] it is recognised that there is potential for competitive interactions between ESN and the Airwave Network because the prospect of ESN being developed as a replacement for the Airwave Network could affect the incentives of ASL to maintain or improve aspects of its offering with a view to delaying customers transferring to ESN; (iv) in paragraph [3.76] both dynamic and static competition are said to be relevant in this market; and (v), in paragraph [3.78] competition between the Airwave Network and ESN is said to be within the category of longer-term competition because it involves the efforts and investments made by ESN's suppliers to develop a new offering.

52. To demonstrate that the issue was material and not hypothetical, reliance was placed upon evidence submitted by Motorola to the CMA before the administrative proceedings which showed that during negotiations with the Home Office about the extension of the agreement beyond 2020, Motorola offered a series of discounts to secure an extension to various future dates, including in particular to 2029. The evidence contains confidential data so I do not refer to it here. The threat of ESN entry had stimulated an improved offer from Motorola thus demonstrating, it was said, that long term dynamic competition was a real and effective constraint upon Motorola in the defined market. As such the failure of the CMA in the Decision to address long term, dynamic, competition was a serious and material error of law. In written submissions Motorola argued:

> "Section 3 of the Decision therefore found that the longer-term, dynamic effect on competition was sufficiently real and material to justify a finding that the Airwave Network and ESN competed in the same market. It follows from this finding that, even before ESN actually comes online, the fact that it will do so is capable of exercising a competitive constraint on the Airwave Network."

53. Bearing this in mind it is contended that the CAT erred when it held in paragraph [80]:

> "It seems to us that the assumption that underpins Motorola's submission is that because the Decision found that competitive constraints can, in principle, operate whilst ESN is under development and before it is operational, there is a finding in the context of the consideration of market definition that they did, in fact, do so and (it follows) that Motorola was in fact incentivised to improve its offering in particular in terms of price. We do not accept that there is any finding to that effect. We agree with the CMA that the question of whether or not ESN did, in fact, act as a competitive constraint in the

> negotiations between the Home Office and Motorola is what is then considered in Section 4: the competitive assessment."

Analysis

54. I do not accept that the CAT erred.

55. First, in Section 3 of the Decision, concerning market definition, the CMA set out the difference between static short-term and dynamic longer-term competition and recognised the relevance of both:

> "3.75 Motorola has submitted that there cannot be a competitive interaction between the two networks because ESN has been designed to replace the Airwave Network, and the transition has been agreed within contracts and does not depend on the relative attractiveness of each network. Our view is that there is potential for competitive interactions between ESN and the Airwave Network. In particular, although ESN is still in development and therefore is not available in the short-term, a central incentive for ESN's suppliers to develop ESN in a timely manner comes from winning new customers from the Airwave Network. We also note that the prospect of ESN being developed as a replacement for the Airwave Network could, in principle at least, affect the incentives of Airwave Solutions to maintain or improve aspects of its offering with a view to delaying customers transferring to ESN.
>
> 3.76 Static competition refers to competitive efforts taken by firms that results in customers being won or lost in the short term (for example, within a year). This might include reducing the prices offered in a negotiation. Dynamic competition refers to competitive efforts that lead to winning customers sometime after the competitive effort is made (for example, investments made today may result in winning new customers several years in the future). Both dynamic and static competition are relevant in this market. A supplier may face different constraints when competing statically than when it competes dynamically. Therefore, when considering the appropriate product market, we have considered demand-side and supply-side substitutability through both lenses.
>
> 3.77 Substitutability in the short run may be different from substitutability in the longer term. In the short run firms compete using the products in their existing portfolios. In the longer term, firms may compete by improving their product portfolios. In this case, as discussed in paragraph 3.63, competition in the supply of LMR network services for public safety takes place over the longer term.
>
> …

> 3.81 Accordingly, while market definition would often take account of short run competition, in this case our focus on longer-term substitutability is appropriate."

56. Certain points are striking. First, the position of Motorola before the CMA was that there was no competitive relationship between ESN and the Airwave Network[2]. Whilst this is not dispositive, since it is the responsibility of the CMA to form its own independent conclusion, it is, nonetheless, an indication that the issue was not high on Motorola's list of best arguments. Secondly, the language used by the CMA in this part of the Decision focuses only upon whether long term competition could in theory be relevant. This is why in paragraph [3.75] the CMA refers to "*potential*", "*prospect*" and "*in principle at least*": the "*potential for competitive interactions between ESN and the Airwave Network*", and, "*that the prospect of ESN being developed as a replacement for the Airwave Network could, in principle at least, affect the incentives of Airwave Solutions to maintain or improve aspects of its offering with a view to delaying customers transferring to ESN*". There is however no finding in this section of the Decision that long term competition was in actual fact a material constraint upon Motorola.

57. Secondly, as a matter of law and of economic logic, because multiple undertakings are in the same product or service market does not necessarily mean that they materially constrain each other. The short point is that they might but will not necessarily do so. A market with three competing participants where A has a market share of (say) 85% and B and C share the remainder with 8% and 7% respectively, is not one where B or C will be able, necessarily, to constrain A even though they compete with it: A dolphin might swim with a whale but still not threaten it. The CMA points to its earlier Competition Commission "*Guidelines for Market Investigations: Their role, procedures, assessment and remedies*" (April 2013) at paragraphs [132]-[133], which recognise that market definition "*is a useful tool, but not an end in itself*" and that "*[t]he boundaries of the market do not determine the outcome of the [...] competitive assessment of a market in any mechanistic way*". In a similar vein, reference is made also to the CMA's Merger Assessment Guidelines (18th March 2021) at paragraph [9.4] and to recognition of the point by the CAT itself in earlier cases e.g. *BGL (Holdings) Limited & Others v CMA* [2022] CAT 36 at paragraph [89(3)].

58. Thirdly, insofar as long term competition from ESN was relevant it is in fact addressed in the Decision, as the CAT found in the Judgment (paragraphs [75] and [81]-[83]). The Decision addressed each set of negotiations between Motorola and the Home Office to see whether the threat of entry by ESN had exerted constraint upon Motorola. In the Judgment at paragraph [75], the CAT refers to the submission of the CMA that it was necessary to consider each set of the extension negotiations in 2016, 2017, 2018 and 2021, to determine whether ESN operated as a constraint upon prices. The CAT held that the CMA was entitled to conclude, by reference to contemporaneous evidence, that ESN did not amount to a material constraint.

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[2] As recorded in the CMA Decision (paragraph [3.72(a)]), during the CMA's market investigation Motorola argued that "*ESN is not a 'competing' alternative: Airwave has always been viewed as a backup for ESN since the Home Office began discussions concerning Airwave's replacement. There is no competitive relationship between ESN and Airwave, and the evidence makes clear it is hopeless to suggest otherwise*".

59. Finally, standing back I have difficulty in understanding how this species of long term dynamic competition would actually work in practice as a constraint. The expression "*long term, dynamic, competition*" refers to the threat to Motorola of the new entry into the market of ESN which, it is said, was capable of imposing a real constraint upon Motorola's pricing such that the finding that upon expiry of the term of the PFI Agreement, Motorola had a position of unconstrained market power was wrong. First, for future entry, credibly, to pose a competitive constraint there must be some, commercially realistic, understanding in the marketplace as to the timing of the new entry. If customers are simply told that a new service will be launched at some unspecified, distant, point over the next few years they are unlikely to be able to use the threat of entry, and the possibility of switching to the new entrant, as a lever to extract better terms from the incumbent supplier. In the present case, the Home Office and users were aware that ESN was substantially delayed which necessarily limited the potency of any constraint upon Motorola. This was not a case where the imminent threat of entry by ESN could be used on a rolling basis to lure customers away from Motorola by aggressive pricing, to which Motorola perforce had to respond. Further, there was in practical terms only one customer, the Home Office[3], which all along had a clear strategy for transitioning all the users of the Airwave Network onto the ESN system when it, finally, became available. Put another way there was no cohort of independent customers who had discretion whether to switch or not and as such they could not use the threat of potential new entry and switching to wrest better terms from Motorola. The Decision (e.g. paragraph [3.79(b)]) recognises this. It accepts that once the Home Office had taken the decision to introduce ESN there would be a transition period during which users would have some choice over the timing of the switch. But no one has suggested that this residual element of discretion over timing could affect the financial terms upon which Motorola offered the Airwave Network to multiple users. I have referred to the evidence relied upon by Motorola (see paragraph [52] above). It is relevant that Motorola has not been able to point to any other way in which this supposed long term dynamic competition manifested itself. And as to the particular instances relied upon they do not show that Motorola felt constrained to agree an extension price reflecting a zero rating for the core assets. The CMA's view which the CAT held was justified was that the negotiations reflected Motorola's market power. The bottom line however is that the CMA took all of this into account; it did not ignore long term competition.

60. For all of these above reasons I reject Motorola's submissions on proposed Ground I.

G. Ground II: The irrationality of the profitability analysis

Motorola's submissions

61. Motorola next argues that the CAT erred in law and failed to recognise irrationality, lack of logic and inconsistent reasoning in the Decision. The main points can be summarised as follows:

    i) The CMA erred in treating any value for the assets above zero as an AEC when, in the Decision, there is no finding that the PFI Agreement asset transfer

[3] Paragraph [39] of the Decision Summary describes the Home Office as: "(i) *the key customer in the relevant market; and (ii) the government department responsible for procuring the replacement for the Airwave Network and/or establishing the arrangements under which a relevant network is provided*."

provisions amounted to an AEC because they failed to provide for a transfer to the Home Office at zero value.

ii) The CMA found that the PFI Agreement, including its asset transfer provisions, reflected what might be expected in a well-functioning market and that also included the prices to be paid by the Home Office to Motorola. The CMA erred in failing to apply this same logic to pricing during the extension period.

iii) The CMA wrongly and irrationally treated the assets, for the purpose of valuation, as "*scrap*" in circumstances, when, plainly, they had a real and enduring value to the Government.

The CMA erred in treating any value for the assets above zero as an AEC when, in the Decision, there is no finding that the PFI Agreement asset transfer provisions amounted to an AEC because they did not provide for a transfer to the Home Office at zero value.

62. Motorola submitted that it was relevant in law that in the Decision the CMA had not treated the failure to provide for the transfer of the assets at zero value in the original PFI Agreement, or for a reduction in prices during any extension period, as an AEC. This was: (i) irrational as being based upon hypotheticals which were inconsistent with the real life experience of how such a PFI contract was structured; and/or (ii) failed to take account of a material consideration; and/or (iii) was internally inconsistent with other fundamental reasoning in the Decision. In written submissions Motorola put the point in the following way:

> "However, there is no finding in the Decision that the failure to provide for transfer of the Airwave Network assets at zero value in the original PFI Agreement, or for a reduction in prices during any extension period, constituted an AEC. As recorded in §28 of the Summary section of the Decision … the CMA found that numerous features of the market constituted AECs – but there is no such finding in relation to the actual terms of the PFI Agreement. Whilst the Decision at §28(c) found that the fact that the Airwave Network assets have not transferred to the Home Office under the terms of the PFI Agreement constitutes an AEC, there is no finding that the asset transfer provisions in the PFI Agreement themselves constituted an AEC."
>
> In circumstances where the CMA relied on counterfactuals that were inconsistent with the direct evidence of what had actually occurred in a well-functioning market, the Tribunal should have found that the CMA's valuation of the Airwave Network assets was irrational (as it is based on hypotheticals that are inconsistent with the real life experience of how such a contract was structured), and/or failed to take account of a material consideration, and/or was internally inconsistent with other fundamental reasoning in the Decision."
>
> (emphasis in original)

63. I disagree with the submission that the Decision did not find that the failure of the PFI Agreement to provide for the transfer of the assets at zero value amounted to an AEC. In the Summary of the Decision at paragraph [28(c)], which is a sub-paragraph especially focused upon by Motorola, the CMA found that the failure of the agreement to transfer the Airwave assets contributed to the AEC. That Summary – which in my view is really quite helpful in facilitating an overall understanding of the reasons for the Decision - does not explicitly link problems associated with the asset transfer provisions to the failure to transfer the assets at zero value. But the Summary is a summary only. It does not purport to record every detail of every argument. For the full story, one must look elsewhere in the detailed reasoning set out in the Decision. And as to this it is clear that the thrust of the CMA reasoning was that intrinsic uncertainty in the scope and operation of the asset transfer provisions prevented that which ought to have happened, namely transfer for zero value. Perceived inadequacies in the contractual language is inextricably aligned, when it comes to identification of the AEC, to the failure of the contractual mechanism to provide for a zero value transfer.

64. It is unnecessary to refer to every one of the numerous paragraphs of the Decision which describe the conclusion of the CMA that the asset transfer provisions were deficient. The Decision found the following uncertainties relating to the contractual terms to be part of the AEC: the failure of the Home Office to acquire the assets; legal uncertainty as to the assets subject to the transfer; the asymmetry of information as between Motorola and the Home Office flowing out of the agreement; uncertainty as to what "*fair market value*" meant; and, litigation risk.

65. In paragraph [6.86], the CMA explains that "*…the actual provisions of the PFI Agreement with respect to the transfer of assets and the value to be paid in that respect give rise to uncertainty. We have also found that this uncertainty is a factor relevant to our finding of an AEC*". The transfer provisions were ineffective for two main reasons: (i) the narrow interpretation taken by Macquarie and Motorola of what amounted to transferable assets and the uncertainty as to the way "*the agreed fair market value*" was to be determined for the purposes of transferring assets (Decision, paragraphs [4.61]-[4.95], [4.179] and [4.189]); and (ii) the continued dependency of the Home Office upon Motorola for equipment and upgrades even if the Network had been brought in house or transferred to a competitor (Decision paragraph [4.185]).[4]

66. By way of an example of the effects of contractual uncertainty, in paragraph [4.63] the CMA recorded that uncertainty arose from the way the PFI Agreement defined the transferable assets as those which were not part of the supplier's existing networks for supplying other customers and which were capable of transfer to another supplier:

> "Both Macquarie, when it owned Airwave Solutions, and later Motorola, took the view that this meant network assets were only transferable if they were used just to provide services to a single customer. Consistent with this interpretation, the draft Service Transfer Plan prepared by Airwave Solutions (see further below) excluded from the list of transferable assets,

[4] See also Decision paragraphs [4.10-4.11], [4.36(a)], [4.39(d)], [4.55], [4.58] – [4.89], [4.91] – [4.95], [6.86] and [6.89].

> among other things [particular assets covered by the confidentiality agreement]."

67. In paragraph [20(b]) the CMA recorded that a "*key*" reason enabling Motorola to charge superprofits was that *"the asset transfer provisions in the PFI Agreement have not resulted in the transfer of network assets to the Home Office, Airwave Solutions continues to own them and acquiring them is not an option the Home Office could credibly pursue or threaten*". In paragraph [28(e)], the CMA found that the fact that the Home Office was "*locked in*" with ASL beyond the period over which prices were, or should have been, constrained by the terms of the PFI Agreement, was a feature of the AEC. Paragraph [28(h)] identifies the failure of the PFI Agreement to constrain prices beyond the original period as contributing to the AEC.

68. So far as the causal connection between the inadequacies of the contractual provisions and the failure to provide for zero transfer pricing is concerned, the Decision is explicit. In Paragraph [4.61]-[4.62] the CMA pointed out that the purpose of the asset transfer agreement provisions were to: *"… facilitate an effective handover – under a Service Transfer Plan (also specified in Schedule 15) – of the responsibility for the provision of the network services from Airwave Solutions to the Home Office (or to the individual customers or to a replacement contractor or contractors)…*". The transfer would operate so as to be consistent with the fact that the "*Home Office would have paid for the network investment costs over that period*", this of course being the premise upon which the CMA based its conclusion that the assets should transfer for zero value:

> "If effective, those clauses, and such an outcome, would be consistent with the nature of PFI agreements, the government guidance on the operation of such agreements in place at the relevant time, the nature of the Airwave Network services, the original fixed period of the PFI Agreement and the notion that the Home Office would have paid for the network investment costs over that period. However, the terms themselves appear to give rise to uncertainties, and the interpretation Airwave Solutions placed on them seems to have differed from the position indicated in relevant government guidance. That interpretation was reflected in the Service Transfer Plan it proposed to the Home Office, which left the network assets in Airwave Solutions' ownership. We explain as follows and in part 1 of Appendix E."

69. Consistent with this reasoning in paragraphs [4.77] – [4.79], the CMA found that the asset transfer provisions failed to provide for the transfer of transferable Airwave Network assets to the Home Office *at no cost* at the end of the PFI Agreement, and that this was a departure from what might be expected:

> "4.77. Additional uncertainties were (and are) liable to arise as a result of the way Schedule 15 of the PFI Agreement provides for transferable assets to be transferred at the end of the agreement for fair market value. We note that under the PFI guidance referred to above, assets that have no practical alternative use would normally be expected to transfer

> automatically to the contracting public authority at no cost. Other PFI guidance makes a similar point: that on expiry of a standard PFI contract, with rare exceptions, the key assets needed to continue to deliver public services should revert to the public sector free of charge.
>
> 4.78 The points set out in paragraphs 31 to 34 of part 1 of Appendix E suggest that some (if not most) of the key Airwave Network assets should in principle fall into the categories of 'asset with no practical alternative use' or of key assets required in the continued delivery of public services. The points reflect that the Airwave Network is dedicated for the exclusive use of the public emergency services and relevant Sharer organisations using radio spectrum reserved for that purpose.
>
> 4.79 The exit and asset transfer provisions did not, however, provide for the transfer of transferable Airwave Network assets to the Home Office at no cost at the end of the PFI Agreement. That is the case even though, as we refer to above, the terms of the contracts were put in place for a specified period following a tendering process in which the winning bidder would be expected to set the price so as to recoup its expected costs of building the network and give it the chance of earning a reasonable return over that period. In addition, in a further departure from general guidance, the basis on which the fair market value was to be calculated is not specified in the PFI Agreement. This created further uncertainty and the potential for dispute, had the Home Office sought to transfer the assets."

70. Pulling the threads together, the conclusion of the CMA that the asset transfer provisions were uncertain and constituted a feature leading to an AEC included its more granular analysis that had the transfer provisions operated differently (and more consistently with good practice) they would have resulted in a transfer at zero value. On a proper reading of the Decision the CAT was correct to reject Motorola's argument to the contrary.

The CMA found that the PFI Agreement, including its asset transfer provisions, reflected what might be expected in a well-functioning market and that also included the prices to be paid by the Home Office to Motorola. The CMA however erred in failing to apply this logic to pricing during the extension period

71. Motorola argues next that the CMA accepted that the 2000 procurement process led to competition "*for*" the market and the PFI Agreement reflected what therefore could be expected in a well-functioning market. The CAT (Judgment paragraph [54(1) and (2)]) also accepted this reality. The prices found in the PFI Agreement were therefore "*fair*" since the agreement provided for the assets to be transferred at a "*fair*" value upon expiration and it followed that in the competitive counterfactual (the well-functioning market) the contract price was a compelling measure of fairness during the extension period. The failure by the CMA to take this into account was an error. In written submissions Motorola argued:

> "The actual PFI Agreement shows what a well-functioning market looks like in terms of the treatment of the assets at the end of the term of the original PFI Agreement, namely the possibility for the Home Office to require the relevant assets to be transferred to it (or a third party) at a fair market value."

72. I disagree with the premise underlying this argument.

73. First, it is true that the CMA concluded that the PFI Agreement was the sort of instrument that might exist in a well-functioning market. It is also true that the CMA did not find that the prices earned under the PFI Agreement during its term were improper. It does not however follow that the price applicable *during* the fixed term of the agreement should necessarily apply during any extension *beyond* that fixed term. Whether the contractual price resonates in any extension would depend upon whether the situations during and after the initial term are true comparators. As to this the CMA found that upon expiration of the initial fixed term the position was "*materially*" different going forward (see paragraph [33] above). It explained why this was the case, including that the assets could properly be expected to have been fully amortised during the initial term.

74. The CMA found that in a well-functioning market the assets should, for the purpose of pricing during an extension beyond the term, be priced at zero, otherwise the consumer would be paying twice for the same asset. This was orthodox, normal, practice in PFI contracts. So, for example, paragraphs [4.64] and [4.65] record that relevant governmental guidance on PFI agreements did not envisage that assets created for the purpose of fulfilling the agreement, and paid for by the commissioning authority, were excluded from the transfer of assets when the agreement ended and that such assets should change hands "*at no cost*".

75. Paragraphs [4.65] and [4.66] of the Decision also refer to evidence from the Infrastructure and Projects Authority ("*IPA*") to the effect that assets with "*no alternative use*" normally transferred to the customer public authority at zero cost at the end of a PFI agreement:

> "4.66 The Infrastructure and Projects Authority – the government's centre of expertise for infrastructure and major projects – has told us that in most cases, assets with no alternative use transfer to the customer public authority at zero cost at the end of a PFI agreement. It said that in some earlier PFI agreements, asset transfer was provided for at market value, and in technology projects obsolescence risks made it difficult to assess both the likely value of assets at the end of the contract period and whether the customer would wish to take them on. It also told us, '… we are not aware of other projects where the contracting authority does not have a right to the assets (whether automatic transfer, at market value etc) at the end of the contract'."

Paragraph [4.77] of the Decision cites HM Treasury Guidance on PFI Agreements ("*PFI: meeting the investment challenge*", July 2003) which in paragraph [3.53] states: "*Upon expiry of a standard PFI contract, with rare exceptions the key assets*

needed to continue to deliver public services revert to the public sector free of charge."

76. The CAT accepted, in my view correctly, the analysis of the CMA that the positions during and post were different and that prices during the former were not a guide to prices during the latter. It is therefore immaterial whether the pricing terms and conditions contained within the PFI Agreement, were, broadly, at that time, reflective of a well-functioning market and/or were otherwise to be treated as "*fair*".

77. Secondly, the asset transfer provisions which applied upon termination applied not only upon the expiry of the actual term but also to other acts of termination in accordance with the terms of the PFI Agreement (see paragraph [18] above). These could have included termination during the currency of the fixed term and in such a case what might have been "*fair*" could have included a sum materially above zero. The asset transfer provisions and its concept of fairness, thus governed scenarios over and above expiration of the term. The test was intended to cover various different circumstances where the process of asset valuation could lead to a result ranging from the nominal to something substantial. This meets the argument of Motorola that, as a matter of contractual logic, use of the word "*fair*" upon expiry of the full term necessarily means something more than zero and that, this being so, had "*fair*" meant zero it would have said this expressly. This argument rests upon the incorrect premise that the contractual concept of fairness applied only to asset transfers triggered by termination brought about by expiry of the term.

78. Finally, and in any event, whatever the agreement might say and whatever inferences might be drawn from its terms, ultimately the remedial powers exercisable under the EA 2002 can override contract. Whilst I recognise that the terms of an agreement, especially if they reflect in some measure a well-functioning market, might be relevant, they are not dispositive. The task for the CAT was to determine whether the Decision, which did override the contract, was lawful and rational. It addressed the weight to be attached to the existence of the language of the asset transfer provisions and to inference that might be drawn from it. It did not leave relevant issues out of account.

The CMA wrongly and irrationally treated the assets, for the purpose of valuation, as "scrap" in circumstances, when, plainly, they had a real and enduring value to the Government

79. Motorola argued as follows. The CMA assigned a value-in-use of zero in the extension period to the assets that had been required to operate the Airwave Network prior to 2020, and which would continue to be used after 2020. This was based upon its conclusion that as of 2020 the assets were "*scrap*" with a commensurate, nugatory, value. The Decision (paragraph [6.96]) states that this approach represented fair market value for those assets because zero was the value which would apply if they were put to an alternative use, i.e. not to provide public safety communications network services in the UK. In the CMA's Provisional Decision (19th October 2022) (at paragraph [6.83]) the CMA equated fair market value with "*scrap*" value:

> "The key insight, it appears to us, from the quoted section of the Byatt Report is that assets should be valued at the level at which they would be traded in the absence of the existence of

> market power for any party which controls those assets. We note that this would be the fair market value of the assets employed by the Airwave Network in their state as of the end of 2019, i.e. their scrap value. The use of (an undepreciated) MEA as the benchmark in this case would seem to us to allow Motorola to capitalise on its incumbent position as owner of Airwave Solutions to realise a windfall gain on the value of its assets (the windfall being the difference between the *scrap value* of the assets which it would have recovered in the absence of the contract extension and their replacement value). As set out above, we are minded to regard the approach set out in the Byatt Report as more appropriate given the circumstances of this case."
>
> (Emphasis added)

It is true that this precise language was not used in the final decision but, Motorola argues, the CMA's logic did not change as between the Provisional and Final Decisions, and as such the use of "*scrap value*" as the guiding explanation remains. The assets were self-evidently not "*scrap*" in the period from 2020 onwards given that the Decision found that public safety communications network services remained, during the extension period, essential for the emergency services and that there was no realistic counterfactual in which public safety communications network services were not provided by anyone. The analysis of the CMA was, accordingly, irrational.

80. In my view the essential premise of the CMA Decision, as endorsed by the CAT, was fully justified. It was not based upon any notion of "*scrap*" value.

81. The CMA did not in the Decision as promulgated use the concept of "*scrap*" value for reasons which seems understandable. It is loose terminology which contemplates the value of an asset where there is no realistic continuing use for an asset regardless of who the user is, for example a defunct household appliance such as an old toaster, television or radio. That is not the case here, because there is, as Motorola contends, an important continuing use for them, in the hands of the Home Office pending the introduction of ESN and this is notwithstanding that the technology is old and there would be scant chance of a third party wishing to acquire such out of date technology.

82. I do not consider that it can properly be argued that the Decision is in substance to be treated as having been based upon a valuation test which is not set out in the Final Decision and which seems to have been deliberately dropped. The continued ability of Motorola to charge for assets which had material value to the Home Office, if not for third parties, once they had been fully amortised, was an adverse impact upon the consumer flowing directly from the market power which Motorola was able to perpetuate upon expiry of the term of the PFI Agreement. The CMA determined that the assets would have no material value in the hands of a third party but that was not the same as saying they have "*scrap*" value when that is not the case for the Home Office. This is the logic which sits at the core of the reasoning in the Decision and it has nothing to do with scrap value as that term is commonly understood where the asset has no subsisting value to anyone. And it was this core reasoning which led the CMA to reject Motorola's argument that the assets should be valued on a replacement MEA basis.

Additional points

83. Motorola has raised, primarily in written submissions, a number of additional arguments. The Respondent and Intervener object that they were not part of the Grounds. I deal with them briefly.

84. First, it is said that the CMA erred because the Decision had no basis in economic literature and contradicted the report produced for the OFT by Oxera in 2003 (entitled "*Assessing profitability in competition policy analysis*") on standard valuation methods (referred to in Judgment paragraph [103]) and nor was it supported by the Byatt Report (a 1986 Report to HMT prepared by an Advisory Group chaired by Dr Byatt entitled "*Accounting for Economic Costs and Changing Prices*") (referred to in the course of the CMA's investigation). As to this, it suffices to record that: (i) the CMA was not bound by these reports; (ii) they do not address standard government guidance on PFI contract and end of term valuations where the assumption is that the assets have been fully amortised during the now expired full term; and (iii), in any event the logic in the Decision stands or falls on its own terms and the CAT found that logic to be rational and justified.

85. Secondly, Motorola argues that the CMA's approach was driven by its conclusion that the Airwave Network assets were "*paid for*" in the period 2000 to 2019 and had a zero valuation in any well-functioning market in the period 2020 to 2029. The CAT (Judgment paragraph [40.1]) accepted that the PFI Agreement was not a construction contract but a contract for the provision of services. Motorola argued that this being so, in ordinary competitive markets, service providers do not slash prices once they have recovered the sunk costs of their assets; "*nor do landlords increase rents and devalue their properties once any mortgage was repaid*". The short answer is that this is not a proper analogy. A landlord does not have market power. The EA 2002 confers a power of intervention and remedy to redress exercises of market power which would not arise in a counterfactual, competitive, market. It is nothing to the point that in the case of a service provider lacking any semblance of market power things are different. The situation is also not comparable for the reason given by the CMA in their written submissions: *"…the CMA found that the PFI Agreement provided a contract price designed to recoup, over a fixed term, the supplier's upfront investment in building the network. Motorola has never challenged this conclusion, or that it did in fact recoup its costs over the original term, and is too late to do so now. The analogy with non-PFI contracts in other market types does not assist with the proper approach to a PFI contract for a public service funded at taxpayer expense.*"

86. For all of these above reasons I reject Motorola's submissions on proposed Ground II.

H. Disposition

87. For the reasons set out above I do not consider that the proposed grounds meet the test for the grant of permission. Motorola advanced three arguments in support of the contention that permission to appeal should be granted on the "*compelling reasons*" basis. First, this was the first occasion when a competition regulator had intervened to rewrite a long term contract with the Government for the provision of services of national importance and there was a public interest in the Court of Appeal considering the basis upon which the profitability of such contracts should be assessed, especially in relation to the approach of the CMA to asset valuation. Secondly, the case was

unusual because it was rare for the CMA to impose a charge control order, this being one of the most intrusive remedies available to the regulator. The intervention was especially unusual in that the market had been decisively shaped by two open procurement process (for Airwave in 2000 and ESN in 2015). The use of the market investigation regime under the EA 2002 in respect of single-firm conduct was not in any event the norm. Thirdly, the consequences of the Decision for Motorola were severe. The challenged Decision left all the existing contractual obligations in place and made service credit liability more onerous whilst "*slashing*" the prices Motorola was permitted to charge under the contract. The Decision envisaged that Motorola would be required to provide the contractual service at this heavily discounted rate until the end of 2029 (subject to a review in 2026). This thwarted the legitimate expectation of Motorola, when it acquired the Airwave network in 2016 in a transaction approved by the CMA, that it would be able to invest in the service to ensure its safe operation for as long as it was required in return for being able to charge the contractually agreed prices. The Home Office challenges this characterisation of the case. Nonetheless, in my view there is no doubt but that the case does raise some issues of broader public importance.

88. It is important to address this in a principled way. In competition cases, it often leaps from the page that the issues are of broad economic and strategic importance at the paper PTA stage. However, the relative strength of the underlying legal arguments is not always apparent. These sometimes become clear only during argument when the Court can question the parties and obtain a better appreciation of what are, invariably, complex factual scenarios in circumstances where it is necessary to gain this understanding to be able then to evaluate the legal arguments.

89. In the present case the Court took the view that because of the importance of the issues it would defer the PTA to an oral hearing which, in practical terms, amounted to the full substantive hearing of the proposed grounds of appeal. Motorola has argued its case fully both in writing and orally. The risk of the Court coming to an ill-informed (negative) decision on PTA at the paper stage, due to the complexity of the facts, has been obviated. The remaining issue is as to the intrinsic arguability of the grounds of challenge and as to this I am of the conclusion that, well argued though they were, they do not pass muster and permission to appeal should be refused.

90. Insofar as the proposed Grounds are based upon alleged errors of law and involve a reading of the Decision and involve arguments that critical reasoning is missing or that the reasons are internally inconsistent or illogical, these can readily be seen to be unfounded by reference to the language of the Decision itself and as to the analysis of that language by the CAT. This Court has jurisdiction to entertain issues of law such as these, but will refuse permission if they have no realistic prospect of success.

91. Insofar as the reasoning in the Decision is said to be irrational (and hence an error of law) the answer is that the underlying findings of fact reflected a legitimate exercise of balancing competing economic and factual considerations where the key matters relied upon were in reality clear cut. The most important were: the premise behind the 2000 procurement exercise which was that the successful bidder would recover the costs and earn a reasonable rate of return upon the assets over the full term of the agreement; established government policy on PFI contracts which was that the investment would be fully amortised by the expiry of the full term and accordingly the assets should transfer to the user for zero cost upon expiry of the agreement; that the

assets in question fell within the scope of the Government PFI policy; that the asset transfer provisions in the PFI Agreement did not provide for automatic transfer at zero cost; and that the assets, given their age and the progression of technology in the interim, would have little if any real value in the hands of a third-party upon expiry of the agreement. Certain other facts were more intensely disputed, such as the effectiveness of the asset transfer provisions and whether they could easily be exercised by the Home Office, but as to this, the Decision sets out fully the relevant facts and the CAT made clear findings. Based upon these facts the CMA inferred that the position of Motorola was materially different following expiry of the initial term, relative to the period preceding expiry. This conclusion prevailed over the contrary submissions of Motorola, summarised at paragraphs [24] and [25] above, which presupposed that there was no difference in analysis to be applied to the periods pre and post expiry and that the basis for valuation of the assets going forward was their replacement value (the MEA basis of valuation – see paragraphs [79] – [82] above) which, as was observed by the CMA, would have resulted in the assets being paid for twice.

92. The facts and matters relied upon in the Decision were accepted by the CAT as being properly within the discretion of the CMA to find. These findings of fact are not capable of being sensibly challenged. It is not arguable that the CAT was wrong to accept these findings or as to the inference drawn from those facts and to prefer the CMA's analysis over that of Motorola. Arguments to the contrary do not approach the threshold whereby this Court could say that the CAT was outside of its remit in finding that the CMA had acted within its remit. There is no proper basis upon which this Court can interfere.

93. For all these reasons I would refuse permission to appeal.

Lord Justice Lewison :

94. I agree.

Sir Julian Flaux, Chancellor of the High Court :

95. I also agree.